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Inequitable Enforcement: Introducing the Concept of Equity into Constitutional Review of Law Enforcement

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This Article addresses a series of situations in which the exercise of police discretion, while passing current constitutional thresholds, seems unfair and unforeseeable. We call this problem "inequitable enforcement." Current constitutional review of police action assesses all stops, searches, and arrests—regardless of how minor the offense—by focusing on the officer's level of suspicion and the officer's compliance with equal protection standards. In this Article, we argue that these existing constitutional mechanisms are flawed and fail to provide an appropriate remedy in cases of arbitrary and disproportionate enforcement for minor infractions. We begin by discussing the necessity of police discretion and the factors that guide officers in exercising it. After tracing the recent development of Fourth and Fourteenth Amendment law in the context of police discretion, we explain why these constitutional protections are inadequate for addressing the problem of inequitable enforcement. This inadequacy, we argue, is a result of the narrow and myopic lens through which the Supreme Court assesses reasonableness in its Fourth Amendment analysis, and discrimination in its Equal Protection analysis. We then suggest a set of considerations for assessing inequitability and present some ways in which those considerations can be integrated into constitutional doctrine. We conclude by discussing the promises and pitfalls of addressing inequitable enforcement through constitutional review.

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INTRODUCTION

Imagine driving on a fifty-five-miles-per-hour highway at sixty miles per hour. Suddenly, you hear the sound of sirens and are ordered, by bullhorn, to pull over to the curb. As the police officer approaches you, you feel a certain degree of indignation. Admittedly, you have slightly exceeded the legal speed limit, but you wonder why you are being stopped for such a minor infraction. Perhaps you belong to a minority group, or have been otherwise targeted by the police before because of how you look or what you wear. You are therefore bitter, but not surprised, at this display of police power. Or perhaps you have other reasons to suspect that this stop is merely a pretext for the officer to run your license plate, or to glance into the passenger compartment in search of contraband. Alternatively, you might be perplexed at having been stopped; you have lived your life relying on an informal, though widely recognized gap between the dry provisions of criminal law and actual enforcement policies. Like everyone else, regardless of your sociodemographic identity or previous experiences with the police, you live in a reality of scarce law enforcement resources, and do not expect to be apprehended, stopped, or otherwise confronted with the police unless your violation of the law is significantly more serious than a minor violation.

This Article is an attempt to analyze the legal and extra-legal aspects of such situations, and to examine whether they are properly addressed in constitutional doctrine. Our main argument is that current constitutional case law fails to perceive and address various failures of police discretion, that which we call "inequitable enforcement."

Our working definition of "inequitable enforcement" is law enforcement activity which, despite satisfying constitutional review, violates notions of fairness, proportionality, and proper resource allocation. We include in this category arrests and thorough searches for minor infractions, as well as enforcement activity in excess of regular police practices or publicly known policies. We have chosen to refer to these failures as "equity failures" for a number of reasons. First, we want to convey the idea that there are various instances of police activity that have been left outside of the legal and constitutional realm, despite possible critiques on the basis of fairness, proportion, and resource allocation. In this sense, at present, these instances are offenses against equity rather than against law. Second, inequitability is not synonymous with inequality. The concept of equity (and, as a corollary, the concept of inequity) has been imbued with a rich tapestry of meaning.[1] Although

1. *See* Darien Shanske, Note, *Four Theses: Preliminary to an Appeal to Equity*, 57 STAN. L. REV. 2053 (2005). Professor Shanske's piece examines the original Aristotelian meaning of equity and observes that its introduction into Western philosophy has imbued the concept of equity with other

inequitability has meant the arbitrary, unequal application of law to different people, it has also referred to other aspects of unfairness.[2] Third, these abundant meanings of inequity underlie our central point: advocating for a multivariate, broad approach when assessing exercise of discretion in law enforcement.

Numerous bodies of scholarship have addressed failures and flaws in the exercise of police discretion. For example, much scholarly attention has focused on the issue of racial profiling in arrests, emphasizing the arbitrariness and discrimination of law enforcement.[3] Others have focused on the issue of pretextual arrests and stops and their justifications.[4] Recently, Margaret Raymond tackled the issue of proportionate enforcement in her work on "penumbral crimes": behaviors that technically constitute lawbreaking but in fact are very close to law-abiding behavior (for example, driving slightly above the speed limit) and therefore are often unenforced.[5] Finally, there is a body of literature building on police and prosecutorial discretion, examining empirically how it is exercised.[6] Some argue for broad discretion while others problematize it;[7] some argue that underenforcement, as well as overenforcement, can contribute to social inequalities.[8] The novelty of our argument is that we see these separate issues as different facets of the same problem—namely, the boundaries of law in understanding police

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meanings as well. *See id.* at 2054–56.

2. For example, the failure to use discretion, *id.* at 2070–71, a failure to match justice to the particular circumstances of the case, *id.* at 2073, or undue harshness in applying the law, *id.* at 2074.

3. The discussion regarding racial profiling—to which we return in Part III for our equal protection argument—has developed around two main hinges: constitutional fairness and actual evaluation of efficiency. For more on this, see BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 195 (2007). These hinges echo the tension between efficiency and fairness highlighted in Herbert Packer's two models, which will be discussed below. *See* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968); *infra* Part II.

4. *See, e.g.*, William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 871–74 (2001); Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN'S L. REV. 1133 (1998).

5. Margaret Raymond, *Penumbral Crimes*, 39 AM. CRIM. L. REV. 1395, 1397–1417 (2002). Raymond identifies some of the problems that go unnoticed when the concept of inequity zooms in only on the discrimination/racism aspect, but her approach differs from ours in that she focuses on the implications of identifying "penumbral crimes" to the articulation of criminal offenses in substantive criminal law, rather than on the constitutional implications for law enforcement. *See id.*

6. *See, e.g.*, Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Law-Visiting Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960). For a thorough analysis of police literature on discretion, see WESLEY G. SKOGAN & KATHLEEN FRYDL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 57–78 (2004). For a classic study of the impact of police officers' personalities on their discretionary choices, see WILLIAM KER MUIR, JR., POLICE: STREETCORNER POLITICIANS (1977).

7. *See, e.g.*, Goldstein, *supra* note 6 at 586–88.

8. *See, e.g.*, Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1748–52 (2006) (emphasizing the impact of underenforcement on creating sanctuaries in low-income neighborhoods, which contribute further to stagnation of these areas of the city).

discretion—and examine the promise, as well as the pitfalls, of a more nuanced approach to the situation.

Contemporary criticisms of police discretion within a constitutional framework have focused primarily on two areas. Fourth Amendment litigation has gradually moved away from examining compliance with the warrant requirement[9] to an examination of the level of suspicion required for police action (measured by probable cause or reasonable suspicion) and its correspondence to the amount of intrusion into a citizen's privacy.[10] Equal Protection litigation is mostly concerned with the uneven application of enforcement measures to different types of people and the extent to which such differences in enforcement are justified by citizen qualification (less so if the classification generates a constitutionally recognized "suspect class"). While these two measures of discretion—suspicion and discrimination—are important, we wish to problematize the reliance on them as the be-all and end-all of police performance assessment by the Court for three reasons. First, as is the case with many constitutional concepts and tests, measures of suspicion and discrimination are plagued by vague and nebulous standards.[11] Second, the constitutionally accepted tests for both suspicion and discrimination require the courts to engage in guesswork as to the officer's true agenda and underlying narratives, a path we consider particularly unfruitful in light of the police organizational culture.[12] Finally, as stated above, the Court's emphasis of these aspects precludes it from developing other measures for assessing, supervising, and improving police discretion. Ironically, the constitutional focus on suspicion and discrimination may have decreased the overall fairness of law enforcement by generating incentives for disproportionate and arbitrary enforcement.

Part I of this Article begins by emphasizing the importance of police discretion in the overall criminal process, and provides an overview of factors impacting police discretion in search, arrest, and other activities. As we show, multiple factors, beyond level of suspicion, are part of everyday decisions to invoke the law against citizens.

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9. *See infra* Part II.

10. This idea was best expressed by Justice Warren in *Terry v. Ohio*, 392 U.S. 1, 10 (1967) ("[I]n dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess."). This is a concept of a "sliding scale" of intrusiveness in police reactions, which corresponds to a sliding scale in the level of suspicion.

11. For critiques of these nebulous concepts, and particularly of the difficulties in distinguishing the different levels of suspicion, see Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

12. This will be discussed primarily in the context of the Equal Protection doctrine and the difficulties in proving racial motives.

In Part II we examine the existing constitutional constraints on police discretion, focusing on suspicion and discrimination. We begin by tracing the genealogy of the Fourth Amendment "reasonableness requirement," demonstrating its limitations as an effective measure of discretion, as well as its impact on the rise in pretextual stops and arrests. We demonstrate the problems with the "reasonableness" approach through the *Robinson*[13]-*Whren*[14]-*Atwater*[15] line of cases, and with the more recent *Virginia v. Moore*.[16] We continue by examining the effectiveness of the Equal Protection Clause, critiquing its inability to address underlying narratives and hidden intentions. The Part concludes with some thoughts on the prospect for remedies under common circumstances (suppression of evidence, possibility of dropping charges, or damages under a § 1983 lawsuit).

Part III offers an alternative path for reviewing exercise of police discretion. We propose a multivariate matrix of considerations for assessing the amount of inequitability. The criteria include the type of law broken, the extent to which the public is aware of its enforcement policy, the public consensus as to the meaning and morality of the law-breaking incident in question, the intensity of police reaction to the violation, and other circumstances, such as the sociodemographic characteristics of the situation. We proceed by offering some ways in which these considerations can be incorporated into Fourth Amendment analysis and used to modify Equal Protection litigation.

Part IV concludes our discussion by exploring the positive and negative implications of introducing the concept of equity into constitutional analysis. Among other issues, we explore the impact of such a move on the foreseeability of police actions, on the transparency of police regulations and enforcement policies, and on deterrence; whether a potential, legal "slippery slope" might stem from an understanding that unenforced behaviors are de facto decriminalized. Finally, we discuss the impact of equity on notions of fairness and due process.

Before providing background, an important caveat should be mentioned: This Article can be read in two ways. Doctrinally, this is an attempt to expand constitutional discourse so as to include inequitable enforcement in the "family" of constitutional violations, generating possible grounds for evidence suppression or acquittal, as well as grounds for constitutional-right infringement suits under § 1983. As will become clear throughout the Article, this solution for the shortcomings of constitutional doctrine, while novel and creative, create a variety of

13. 414 U.S. 218 (1973).
14. 517 U.S. 806 (1996).
15. 532 U.S. 318 (2001).
16. 128 S. Ct. 1598 (2008).

problems in interpretation and implementation and, given recent Supreme Court Fourth Amendment decisions,[17] may not be politically viable. There is, therefore, a second and more critical way to approach our argument. Namely, our concept of inequitable enforcement should be seen not as a pragmatic, proposed solution, but as a means to critique and problematize the existing controls on law enforcement, and as a plea for greater sensitivity to fairness and sound judgment.

I. DISCRETION IN POLICE ACTIVITIES

A. WHY REVIEW OF POLICE DISCRETION IS IMPORTANT

All law enforcement agencies exercise a certain amount of discretion in fulfilling their duties.[18] As many classic studies of the criminal justice system note, discretion plays an important role in case management,[19] plea bargaining,[20] sentencing,[21] and release decisions;[22] it is particularly necessary to regulate high caseloads and alleviate pressure from the system.[23] However, there is a delicate balance between the type and amount of discretion exercised by different governmental parties. The amount of discretion exercised in earlier stages of the process by the police and the prosecution, as opposed to later discretion by the courts, depends on the constitutional and statutory limitations on these actors' freedom to shape their policies and workdays.[24] This balance is well

17. Our pessimism stems primarily from *Herring v. United States*, 129 S. Ct. 695 (2009), which expanded the scope of the good faith doctrine; while *Herring* itself should probably not be interpreted as the death blow to the exclusionary rule, when seen broadly, in the context of decisions such as *Moore*, 128 S. Ct. at 1598—which we discuss in greater detail below—it can be said to undermine the importance of regulations and affirm a belief in unguided police discretion.

18. This discretion is essential for the screening action which occurs at every step of the process, diverting cases out of the system. For a good visual depiction of this "screening out" process, see U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL JUSTICE SYSTEM FLOWCHART, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cjsflowco.pdf.

19. For analyses of prosecutorial discretion, see KEITH HAWKINS, LAW AS LAST RESORT: PROSECUTION DECISION-MAKING IN A REGULATORY AGENCY (2003); JOHN L. WORALL & M. ELAINE NUGENT-BORAKOVE, THE CHANGING ROLE OF THE AMERICAN PROSECUTOR (2008); Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC'Y REV. 531 (1997); and Goldstein, *supra* note 6.

20. For an analysis of defense attorney discretion, see Debra S. Emmelman, *Trial by Plea Bargain: Case Settlement as a Product of Recursive Decisionmaking*, 30 LAW & SOC'Y REV. 335 (1996).

21. This is particularly interesting in the context of determinate sentencing. *See* Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 LAW & SOC'Y REV. 733 (2001).

22. *See* Mona Lynch, *Waste Managers? The New Penology, Crime Fighting, and Parole Agent Identity*, 32 LAW & SOC'Y REV. 839, 841 (1998).

23. There is at least a perception that informality is essential for these purposes. *See* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN LOWER COURTS 417–18 (1979).

24. For example, as determinate sentencing developed to decrease judicial discretion, the burden of discretion shifted to the shoulders of prosecutors. *See* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 78–103 (1998).

illustrated in Herbert Packer's classic book *The Limits of the Criminal Sanction.*[25]

In his book, Packer provides two "ideal type" models of the criminal process: the crime control model and the due process model.[26] Under the crime control model, the system's first and foremost objective is achieving efficiency through an early determination of guilt by law enforcement agents, so that only cases for which we can say there is a "presumption of guilt" get to court.[27] Unlike the "presumption of innocence," the "presumption of guilt" is not a normative legal term; it is merely a statistical observation that a given defendant is likely guilty if she has been screened by the early stages of the criminal process and her case has not been dismissed.[28] The crime control model entails a substantial degree of respect for and deference to the police and the prosecution.[29] While courts, and the adversarial process in general, are laden with technicalities and hurdles that make the process cumbersome and expensive, agencies whose mission it is to investigate guilt are the best placed to examine the facts and to get rid of difficult, dubious cases before they clog the court system.[30]

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25. *See* PACKER, *supra* note 3.

26. Neither of the two models is designed to provide a realistic description of the criminal justice system. As Packer explains, they are merely "ideal types," which provide two ends of a spectrum along which one might locate a specific system or track transitions in its adherence to certain principles. *Id.* at 153–54. It is important to keep in mind that Packer's book was written in 1968, based on a piece published in 1964, at the height of the Warren Court's involvement in constitutionalizing criminal procedure; Packer used this model to demonstrate how constitutional incorporation encouraged a move from crime control to due process. For more background on these choices, see generally Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671 (1999).

27. *See* PACKER, *supra* note 3, at 160.

> The presumption of guilt is what makes it possible for the system to deal efficiently with large numbers, as the Crime Control Model demands. The supposition is that the screening processes operated by police and prosecutors are reliable indicators of probable guilt. Once a man has been arrested and investigated without being found to be probably innocent, or, to put it differently, once a determination has been made that there is enough evidence of guilt to permit holding him for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty. The precise point at which this occurs will vary from case to case; in many cases it will occur as soon as the suspect is arrested, or even before, if the evidence of probable guilt that has come to the attention of the authorities is sufficiently strong. But in any case the presumption of guilt will begin to operate well before the "suspect" becomes a "defendant."

Id.

28. *Id.* at 160–62.

29. *Id.* at 187.

30. *See id.* at 162.

> In the presumption of guilt this model finds a factual predicate for the position that the dominant goal of repressing crime can be achieved through highly summary processes without any great loss of efficiency (as previously defined), because of the probability that, in the run of cases, the preliminary screening processes operated by the police and the prosecuting officials contain adequate guarantees of reliable fact-finding. Indeed, the model takes an even stronger position. It is that subsequent processes, particularly those of a

By contrast, the due process model's main goal is preserving accuracy and avoiding the conviction of the innocent.[31] As opposed to the crime control model's "assembly line" nature,[32] due process can be captured by a metaphor of meticulous quality control.[33] This model sees the constitutional rights of defendants not as hurdles to an efficient process, but as necessary guarantees that the question of guilt will be carefully examined in a neutral, unbiased environment—that of the court.[34] The police and the prosecution are seen as biased entities that have vested organizational and functional interests in apprehending suspects and bringing them to trial.[35] The due process model therefore emphasizes the normative presumption of innocence and the dangers of providing the police and the prosecution with ample roles in the criminal justice system.

Since their creation, Packer's models have received a great degree of criticism from scholars.[36] Some scholars have added models to Packer's existing two, particularly models involving victims and victim advocates.[37] More related to our purposes, some scholars argue that, while the due process model relates largely to doctrinal, normative mandates, the crime control model is by nature a pragmatic description of the everyday management of law enforcement, a reality recognized by the Warren

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> formal adjudicatory nature, are unlikely to produce as reliable fact-finding as the expert administrative process that precedes them is capable of. The criminal process thus must put special weight on the quality of administrative fact-finding. It becomes important, then, to place as few restrictions as possible on the character of the administrative fact-finding processes and to limit restrictions to such as enhance reliability, excluding those designed for other purposes.

Id. This systemic reliance on administrative processes is confirmed by empirical evidence pointing to the large amounts of discretion exercised daily by police officers. This was noticed by police scholars during the Warren Court era. *See, e.g.*, JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 12–15, 71–90 (1966); *see also* SKOGAN & FRYDL, *supra* note 6, at 74.

31. PACKER, *supra* note 3, at 165.

32. *Id.* at 159.

33. *Id.* at 165.

34. *Id.* at 152–54.

35. *See id.* at 163.

> The Crime Control Model, as we have suggested, places heavy reliance on the ability of investigative and prosecutorial officers, acting in an informal setting in which their distinctive skills are given full sway, to elicit and reconstruct a tolerably accurate account of what actually took place in an alleged criminal event. The Due Process Model rejects this premise and substitutes for it a view of informal, nonadjudicative fact-finding that stresses the possibility of error.

Id.

36. Leslie Sebba, *Herbert Packer's Models of Criminal Justice in Historical Perspective* (May 2006) (unpublished paper presented at New Directions in Criminal Courtroom Research, Tel Aviv University), *available at* www.tau.ac.il/law/events/16-17-05-07/conferenceprogram.doc.

37. *See, e.g.*, Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289; Roach, *supra* note 26.

Court in its formative years.[38] In any case, if Packer's intent was to delineate the transition from crime control to due process in the era of the Warren Court, it is widely acknowledged that the post–Warren Courts, whose composition changed through President Nixon's appointees,[39] have led to a pendulum swing toward crime control, manifesting itself in four main themes.[40] First, the post–Warren Court has emphasized that the ultimate mission of the criminal justice system is to convict the guilty and to let the innocent go free.[41] Rather than creating bright-line rules, it placed more emphasis on the defendant's actual guilt—a practical application of Packer's "presumption of guilt."[42] Second, the Court shifted from relying on clear standards of action to allowing an assessment of police activities under a "totality of the circumstances" test.[43] Third, the post-Warren Court expressed more reliance on, and more deference to, police discretion.[44] A recurring theme in its decisions is the acknowledgment that the police act in good faith and that their decisions are made under difficult conditions.[45] Finally, the Court's former tendency to intervene on appeal on behalf of the defendant, particularly in collateral attacks, has greatly diminished, especially with respect to proceedings before state courts.[46]

For our purposes, these main characteristics of the post-Warren Court closely correlate with an important feature of the crime control

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38. *See* Malcolm M. Feeley, *Two Models of the Criminal Justice System: An Organizational Perspective*, 7 LAW & SOC'Y REV. 407, 422 (1973); *see also* SKOGAN & FRYDL, *supra* note 6; SKOLNICK, *supra* note 30, at 9–15, 182–83.

39. Chief Justice Burger was appointed in 1969, Justice Blackmun was appointed in 1970, and Justices Powell and Rehnquist were appointed in 1972.

40. *See, e.g.*, CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 9–10 (5th ed. 2008).

41. *Id.* at 4.

42. *Id.* Perhaps the best example of this is the erosion of the Miranda warning to the status of a "stepchild" in the constitutional family of rights, held by Justices to be a prophylactic, albeit one with constitutional status. *See* United States v. Patane, 542 U.S. 630, 634 (2004); Dickerson v. United States, 530 U.S. 428, 432 (2000); Oregon v. Elstad, 470 U.S. 298, 300 (1985); New York v. Quarles, 467 U.S. 649, 655–56 (1984); New Jersey v. Portash, 440 U.S. 450, 459–60 (1979); Michigan v. Tucker, 417 U.S. 433, 452 (1974).

43. WHITEBREAD & SLOBOGIN, *supra* note 40, at 5. This transition is notable in the shift from defining probable cause as two "prongs"—veracity and basis of knowledge, *see* Spinelli v. United States, 393 U.S. 410, 412–13 (1969); Aguilar v. Texas, 378 U.S. 108, 113–14 (1964), to examining it in light of the "totality of the circumstances," *see* Illinois v. Gates, 462 U.S. 213, 252 (1983).

44. WHITEBREAD & SLOBOGIN, *supra* note 40, at 5.

45. *See id.* at 6–7; *see also, e.g.*, Herring v. United States, 129 S. Ct. 695, 702–04 (2009) (giving the police leeway when relying on their own mistakes, as long as they are merely "negligent," rather than "reckless" or "intentional"); United States v. Leon, 468 U.S. 897, 920–21 (1984).

46. *See* WHITEBREAD & SLOBOGIN, *supra* note 40, at 7–8. The narrowing of the door on habeas corpus is particularly important. *See* Teague v. Lane, 489 U.S. 288, 360 (1989). Actual innocence—a situation in which the "presumption of guilt" fails—may still be litigated through collateral attack, though many procedural hurdles exist for the defendant. *See* Murray v. Carrier, 477 U.S. 478, 496 (1986); Jackson v. Virginia, 443 U.S. 307, 320–21 (1979).

model: an increasing reliance on the earlier steps in the criminal process and, in particular, broad deference to police discretion. The tendency to provide the police with vague, catchall provisions illustrates the Court's belief in the experience and common sense of police officers in the field, rather than in the ability to review their decisionmaking process in hindsight, in the sterile world of the courts.[47]

The police therefore exercise a great degree of discretion in their daily decisions, and the courts are well aware of this.[48] Moreover, the courts do not merely acknowledge police discretion as a "necessary evil," but see it as a desirable feature of law enforcement professionalism.[49] Indeed, courts have good reasons—both normative and organizational—to support the exercise of police discretion. As to the former, no web of bright-line rules will ever cover one hundred percent of all situations in which police officers may find themselves, and the system has a vested interest in assuring not only their resourcefulness, but also their safety.[50] Considering organizational variables, broad police discretion to discard potential cases early in the process is an efficient way to control expensive, time-consuming caseloads. This factor is especially true in light of the American legal system's reliance on more or less determinate sentencing structures, which tie the court's hands at later stages of the process and therefore necessitate shifting discretion to other agencies.[51]

B. Factors Impacting Police Discretion

Since police discretion is not simply acknowledged, but expected and encouraged, it becomes important to examine how this discretion is exercised. Joseph Goldstein's classic analysis of the realities of selective

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47. Chief Justice Warren's opinion in *Terry v. Ohio*, decided at the height of the due process revolution, is an excellent example of the Court's awareness of the realities of police discretion. *See* 392 U.S. 1, 10 (1967) ("[I]t is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess.").

48. *See id.*

49. *See id.* at 13.

> Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation.

Id.

50. A good example of this is the emergence of the "protective sweep" of houses, *see* Maryland v. Buie, 494 U.S. 325, 337 (1995), and cars, *see* Michigan v. Long, 463 U.S. 1032, 1049–50 (1983), which are aimed at police safety and relies on an assessment of discretion regarding "reasonable suspicion." The suspicion needs to be articulable, but its nature is not proscribed. *Terry*, 392 U.S. at 26.

51. *See* Stith & Cabranes, *supra* note 24. The reliance on guidelines as a limiting factor persists even after the loss of their mandatory power in *United States v. Booker*, 543 U.S. 220, 259 (2005). *See* Rita v. United States, 551 U.S. 338, 347 (2007).

law enforcement points to the impossibility of formally pursuing every legal infraction.[52] As Goldstein argues, police discretionary decisions, as opposed to prosecutorial and judicial discretionary decisions, have a remarkably low public profile.[53] This is particularly true of decisions to discard cases, which are often, by their nature, absent from police records.[54] Moreover, the reasons for forgoing full enforcement are complex and diverse and include, among others, the cultivation of informers,[55] a lack of interest on the part of the victim in pursuing a complaint,[56] and police activity designed only to harass and curb criminal activity rather than to uncover specific incidents.[57] More recent research on police decisions to arrest points to a set of pragmatic considerations, including the technical hassles of hauling arrestees to the station, which might lead the police to forego an arrest.[58] In addition to organizational pressures, ethnographic work on the police indicates that the individual officer's personality and worldview have a significant impact on his or her willingness to pursue a matter officially.[59] Another important detail is the distinction between a single officer's on-the-spot decision whether or not to detain, arrest, or search, and a police department's guidelines and internal regulations on how to proceed with a certain category of cases. Most police departments have detailed guidelines for police work;[60] some departments make them easily accessible to the public.[61]

The rich set of considerations identified by empirical studies on police work brings up an important group of questions for lawyers and

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52. *See* Goldstein, *supra* note 6.

53. *Id.* at 543.

54. *Id.* at 546–47.

55. *Id.* at 565–66.

56. *Id.* at 574; *see also* Beloof, *supra* note 37, at 306.

57. Using such informal methods is well documented in police literature. *See* SKOGAN & FRYDL, *supra* note 6, at 68–69.

58. EDITH LINN, ARREST DECISIONS: WHAT WORKS FOR THE OFFICER? 74–83 (2008).

59. MUIR, *supra* note 6.

60. SKOGAN & FRYDL, *supra* note 6.

61. The recent lethal shooting of Oscar Grant at the Fruitvale Bay Area Rapid Transit station in Oakland, CA, brought some of these issues to light. The police officer in question argues, as his defense, that his intention was to use a Taser stun gun rather than his sidearm. Demian Bulwa, *Skeptical Judge Grants Bail to Former BART Cop*, S.F. CHRON., Jan. 31, 2009, at A-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/01/31/MNBI15KCD5.DTL. There are detailed regulations regarding the usage of stun guns. *See* Jim Leusner & Katie Fretland, *Florida Police Followed Guidelines in Campus Taser Incident*, ORLANDO SENTINEL, July 8, 2008. Detailed guidelines are created even for far less serious incidents. *See, e.g.*, SAN LEANDRO POLICE DEPARTMENT GUIDELINES FOR SCREENING VIOLATIONS, *available at* http://www.ci.san-leandro.ca.us/pd/GuidelinesScreeningViolations.pdf (showing the San Leandro's police regulations on processing traffic offenses). In the United Kingdom, detailed model guidelines are published by the Association of Chief Police Officers. *See* Assoc. of Chief Police Officers, Policies, http://www.acpo.police.uk/policies.asp (last visited Nov. 17, 2009). It should also be mentioned that the practice of publicizing departmental guidelines, as is true with many other fundamental structures and practices, varies greatly across departments. *See* SKOGAN & FRYDL, *supra* note 6, at 49–50.

legal scholars, namely, how to examine enforcement decisions. On one hand, the public is uncomfortable with the pursuit of what we perceive as "minor infractions" in the "penumbra" of lawbreaking.[62] Not only is enforcement of these infractions seen as inefficient, it is also perceived as unfair, especially when it violates a public understanding that enforcement does not usually occur in such circumstances.[63] On the other hand, there are clearly situations in which underenforcement has dire implications, particularly when underenforcement in inner-city, minority-populated neighborhoods, creates safe havens for crime in low-income communities.[64] Moreover, any constitutional constraints on police action have to take into account possible variations across states, cities, and even individual police departments, as well as implementation problems. We now examine the existing balance of these considerations, as crafted by the Supreme Court.

II. CURRENT CONSTITUTIONAL CONSTRAINTS ON POLICE DISCRETION

Police discretion has come to the Supreme Court's attention through two main constitutional vehicles: the Fourth Amendment's protection against unreasonable searches and seizures, and the Equal Protection Clause's defense against discrimination.

A. FOURTH AMENDMENT LITIGATION

The Fourth Amendment contains two directives for law enforcement: there shall be no "unreasonable searches and seizures," and the mandate that "no Warrants shall issue, but upon probable cause."[65] These two clauses can be referred to as the "reasonableness clause" and the "warrant clause" respectively. Over time, as the Supreme Court developed legal standards for reviewing police conduct, it steadily moved from its initial reliance on the warrant clause to the current primacy of the reasonableness clause. "Reasonableness," in the Fourth Amendment context, has been interpreted to refer almost exclusively to the level of police suspicion, underemphasizing the importance of prioritizing and maintaining a sense of proportion. While some local jurisdictions have found ways to limit police power with regard to trivial matters, as well as prohibit racial profiling and pretextual police activities, the Supreme Court has not responded to these concerns when framing police discretion in constitutional terms.

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62. *See* Raymond, *supra* note 5, at 1420.

63. *Id.* Raymond goes as far as to suggest that underenforcement of penumbral crimes "might simply reflect a different type of criminal law—one that enforces a widely recognized norm that happens to differ, in a universally understood dimension, from the expressed legal standard." *Id.*

64. *See* Natapoff, *supra* note 8, at 1748–50.

65. U.S. CONST. amend. IV.

1. *From the Warrant Requirement to Reasonableness*

Historically, the Fourth Amendment was understood as a prohibition on general warrants, common tools of the crown in the colonies.[66] The Framers considered general warrants to be the most serious concern with regard to searches and seizures, because the power of peace officers was quite limited and warrantless searches were uncommon.[67] The reasonableness clause was included to underscore the strength of the Framers' conviction that the use of general warrants should be banished in the United States,[68] and to serve as a "background value" for applying the warrant clause.[69]

Until the mid–twentieth century, the warrant clause was the entire thrust of the amendment; the Supreme Court even suggested that a warrantless search was always invalid.[70] The reasonableness clause was only invoked when the Court faced situations in which obtaining a warrant was impracticable, and even then it was used sparingly.[71] For example, in *Chimel v. California*, the Court rejected the argument that any search incident to arrest is inherently reasonable and hence permissible under the Fourth Amendment.[72] Such reasoning outlived its usefulness, however, and just four years later the Court reversed course on the question of searches incident to arrest.[73]

In an article tracing the changing focus of the Court from the warrant requirement to the reasonableness clause, Thomas Davies argues that the modern reliance on the reasonableness clause is a product of "*post-framing* developments that the Framers did not anticipate."[74] This is a provocative assertion, since the most devout originalists on the Court were the ones to push the reasonableness clause to the forefront.[75] Justice Scalia backs up his reliance on the reasonableness clause with an interpretation of history and general

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66. *See* Thomas J. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551 (1999).

67. *Id.* As Davies explains, the cities and towns of eighteenth-century America had no "police departments" at all, but rather a single sheriff and a jail staff. *Id.* at 552.

68. *Id.* at 551 ("The evidence indicates that the Framers understood 'unreasonable searches and seizures' simply as a pejorative label for the inherent illegality of any searches or seizures that might be made under general warrants.").

69. Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 387–88 (1988).

70. *See* Agnello v. United States, 269 U.S. 20, 32 (1925).

71. *See* Sundby, *supra* note 69, at 386.

72. 395 U.S. 752, 768 (1969); *see also* Sunby, *supra* note 69 (discussing *Chimel*, 395 U.S. 752).

73. *See* United States v. Robinson, 414 U.S. 218, 235 (1973).

74. Davies, *supra* note 66, at 552.

75. *See* California v. Acevedo, 500 U.S. 565, 583 (1991) (Scalia, J., concurring) ("In my view, the path out of this confusion should be sought by returning to the *first principle* that the 'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afforded.").

warrants.[76] However, regardless of historical disagreements as to the Founders' intent, the Court's shift in emphasis from the warrant clause to the reasonableness clause was fueled by practical considerations. Two of these important considerations were the rise of the regulatory state (with the resulting need to conduct administrative searches outside the normal crime-scene context),[77] and drug and gang wars, which led to the increased use of pretextual prosecutions built on evidence obtained through *Terry* stops.[78] The shift from warrant to reasonableness both created and exacerbated problems related to arbitrary and unforeseeable overenforcement of minor infractions.

a. Administrative Searches and the Rise of the Regulatory State

Modern government includes a regulatory scheme covering citizens' daily lives. As regulations have been promulgated, the Court has allowed warrantless searches as a means of enforcing those regulations.[79] Some examples of the diverse set of contexts for these searches include highway sobriety checkpoints,[80] border searches,[81] suspicionless searches of parolees,[82] and locker searches in schools.[83] These "administrative searches" allow the modern regulatory state to function, and so the Court has bowed to the government's demand for more efficient enforcement by allowing warrantless searches.[84] The Court has characterized administrative searches as being essentially regulatory, as opposed to penal, in nature, and thus not as deserving of Fourth Amendment scrutiny.[85] This logic breaks down, however, when the fruits

76. *See id.* at 581–82.

77. *See infra* Part II.A.1.a.

78. *See infra* Part II.A.1.b; *see also* Terry v. Ohio, 392 U.S. 1, 10 (1968).

79. *See* Camara v. Mun. Court, 387 U.S. 523, 525 (1967) ("[M]ore intensive efforts at all levels of government to contain and eliminate urban blight have led to increasing use of such inspection techniques . . . ."); *see also* Griffin v. Wisconsin, 483 U.S. 868, 873–74 (1987) (holding that certain places, such as prisons or schools, give rise to special needs beyond general law enforcement, which necessitate warrantless searches on something less than probable cause); United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985) (holding that the government's interest in controlling the entry of people and things into the country allows for the detention of travelers at the international border on less than probable cause).

80. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

81. *See* United States v. Ramsey, 431 U.S. 606 (1977).

82. *See* Samson v. California, 547 U.S. 843 (2006).

83. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985).

84. *Id.* at 351 (Blackmun, J., concurring in the judgment) ("[S]pecial needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable . . . ."); *see also* Posting of Ryan Singel to *Wired Magazine*'s Threat Level Blog, FCC's Warrantless Household Searches Alarm Experts, http://www.wired.com/threatlevel/2009/05/fcc-raid/ (May 21, 2009, 12:00 am) (showing a recent example of the extent of such permissions: the Federal Communications Commission's authority to search every home in which a wireless router can be found).

85. *See* Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) ("[C]onducting searches pursuant to a *regulatory scheme* need not adhere to the usual warrant or probable-cause requirements as long as

of a search conducted for a regulatory purpose are then used to prosecute.

Administrative searches are evaluated by the Court under the reasonableness standard, balancing the degree of intrusion upon the citizen against the government's need for the intrusion.[86] In *Camara v. District Court*, Justice White made a leap of logic from required probable cause to reasonableness when he wrote that "[t]he warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard."[87]

It is important to note one significant restriction on the power of police to conduct administrative searches: The officer should not have the discretion to choose whom he or she searches.[88] This point is quite central to the discussion since one of the most difficult challenges faced by the police is responding to the public critique of nonrandom enforcement, such as racial profiling.[89] It could even be said that the vast powers to conduct intrusive administrative searches based on little or no suspicion are "cleansed," to a great extent, by their random nature.[90]

b. Gang Violence and the Drug War

The second practical reason for the shift to reasonableness is the changing focus of law enforcement, especially in urban centers, from property and personal crimes to narcotic and gun crimes. Armed with the investigatory tool of the *Terry* stop, police tactics have evolved to confront the new threats.

As the face of urban crime has changed over the past generation, police forces have turned to drug and gun crime ("gun crime" defined as offenses involving gun registration and licensing) as a way to combat violent crime.[91] This is police work by proxy, made necessary by, among other things, the reluctance of witnesses in gang-controlled neighborhoods to come forward and provide crucial eyewitness evidence to gang related crimes.[92] Faced with increasing difficulty when solving

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their searches meet 'reasonable legislative or administrative standards.'" (emphasis added) (quoting Camara v. Mun. Court, 387 U.S. 523, 538 (1967))).

86. *See T.L.O.*, 469 U.S. at 325 (discussing this constitutional balancing act).

87. 387 U.S. at 539.

88. Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1438 (2000).

89. Indeed, many police departments have begun to collect data on their stops and license checks to examine whether they are conducted in a random manner. SKOGAN & FRYDL, *supra* note 6, at 320–22.

90. Compare the Supreme Court's permissive approach toward random stops, *see* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990), to its attitude toward nonrandomized checks, *see* Delaware v. Prouse, 440 U.S. 648, 663 (1979).

91. *See* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2020 (2008).

92. *Id.* at 2021. Stuntz also considers factors such as the Warren Court's criminal procedure jurisprudence and the increase in the ratio of stranger crime to have contributed to the increasing

urban violent crime, law enforcement turned to drug and gun laws to provide more easily proven prosecutions, all with the explicit approval and encouragement of the government. President Clinton directed the FBI to use drug prosecutions to take down gangs in the same way that tax prosecutions were used to take down Al Capone.[93] The federal program "Project Safe Neighborhoods" utilizes aggressive prosecution of two particular gun laws.[94] The U.S. Code prohibits felons from possessing a firearm,[95] and enhances sentences for those caught with guns "during and in relation to any crime of violence or drug trafficking crime."[96] Through this program, state law enforcement agencies refer cases to federal prosecutors in order to take advantage of much harsher sentencing regimes, with the stated goal of obtaining "the longest sentence possible."[97]

Narcotic crime in particular lends itself to pretextual criminal justice policies. Not only are drug crimes relatively easily prosecuted,[98] but sentencing rates for such offenses have steadily increased since the 1980s,[99] and are comparable to sentences for violent crimes.[100] Furthermore, there is little public outcry because the practice is generally popular for its getting the "bad guys off the street," even if their more heinous crimes remain unsolved. *Terry* stops are a common method for obtaining evidence in narcotic and gun cases.[101]

Interestingly, there is a historical model for pretextual prosecutions of minor infractions. Prohibition, which was enforced with wide disparity in different parts of the country, is an early example of a crime that caused progressive Justices Holmes and Brandeis to begin "to question

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difficulty police departments find in "clearing" violent crimes. *Id.* at 2017 n.229.

93. *Id.* at 2020.

94. *See* Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 312 (2007).

95. 18 U.S.C. § 922(g)(1) (2006).

96. *Id.* § 924(c)(1)(a).

97. Gardner, *supra* note 94, at 307 (citing Press Release, Debra W. Yang, L.A. Law Enforcement Officials Roll-Out Project Safe Neighborhoods (Dec. 18, 2003)). For a more recent example of aggressive prosecution, see *Cross Currents: US Attorney Russoniello's Tough on Drugs Tactics* (KALW Radio broadcast May 4, 2009), *available at* http://www.crosscurrentsradio.org/features.php?story_id=2083.

98. Drug cases are more likely to be prosecuted than other crimes. *See* Bureau of Justice Statistics, Drugs and Crime Facts: Drug Law Violations and Pretrial, Prosecution, and Adjudication, http://bjs.ojp.usdoj.gov/content/dcf/ptrpa.cfm.

99. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 95–96 (1997).

100. This is especially true with one or more prior convictions. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2007) (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)).

101. Wayne R. LaFave, *The "Routine Traffic Stop" From Start To Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1852–53 (2004). Also used are "buy and bust" operations, which instead utilize the search-incident-to-arrest doctrine to obtain the necessary evidence. *See* RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES 19, 68–71 (1984); *see also* SKOGAN & FRYDL, *supra* note 6, at 267.

the legitimacy of positive law that lacked resonance with the customs and mores of the population."[102] Just as modern narcotics laws were enacted to combat violent crime from an indirect angle, Prohibition was intended to accomplish societal changes that direct prosecutions could not, such as promoting workplace effectiveness, Americanizing new immigrants, controlling Southern blacks, and generalized crime reduction.[103] Prohibition was an early incarnation of the tactics used today in the drug war. In the end, Prohibition failed (partially) due to the inequitable enforcement of the laws.[104] However, narcotic laws, which are enforced far less equitably than Prohibition laws ever were, seem much less likely to follow the same fate.[105] One might conclude that modern Americans, as a society, are more concerned with the social blight associated with narcotics than their ancestors were with alcohol, that there is simply no comparable demand for the freedom to use narcotics responsibly as there was a demand for drinking responsibly, or that modern America is much more tolerant of this kind of ends-orientated law enforcement. The Supreme Court appears to hold this last view.

2. *The* Robinson-Whren-Atwater *Problem of Search Discretion*

The current state of Fourth Amendment jurisprudence allows little room for a defendant to challenge his or her stop or search based on any argument other than level of suspicion. The combination of three cases, harnessed together, precludes a defendant from making any other argument. First, *United States v. Robinson* established the "search incident to arrest" doctrine.[106] In the years since *Robinson* was decided, this "exception" has become the rule, and searches incident to arrest are now a commonly used technique to gather evidence.[107] Next, in *United States v. Whren*, the Court endorsed—or at least failed to repudiate—the growing police practice of pretextual stops.[108] The Court held that as long as police had probable cause to believe some crime was being committed, they could make a stop, regardless of whether the crime that precipitated the stop had anything to do with the real reason that the officer made the stop.[109] Finally, in *Atwater v. City of Lago Vista*, the Court held that a police officer could make an arrest for any violation, no matter how

102. Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 2 (2006).

103. *Id.* at 16–17. With respect to alcohol prohibition, see generally JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (1968).

104. Stuntz, *supra* note 91, at 2024 ("A critical mass of Prohibition's supporters evidently concluded that repeal was preferable to uneven enforcement.").

105. *Id.*

106. 414 U.S. 218, 224, 234 (1973).

107. VAN DUIZEND ET AL., *supra* note 101, at 19, 68–71.

108. 517 U.S. 806, 813 (1996).

109. *Id.* at 813–15.

small.[110] These three cases work together to give law enforcement broad, highly discretionary search authority. This allows officers to tail a suspicious vehicle until some picayune vehicle code violation is observed, thereby furnishing probable cause for the stop, arrest, and subsequent search.

The problematic aspect of the *Robinson-Whren-Atwater* line of decisions lies in the decisions' reliance on probable cause as a bulwark against undesirable police activity. The reliance on probable cause has outlived its usefulness on streets where police can almost always find some kind of vehicle code violation with which to beat back a defendant's invocation of his or her Fourth Amendment right. For example, testimony in a class action lawsuit filed against the Illinois State Police[111] revealed the following statistics: Hispanics, who account for less than eight percent of the state population and take less than three percent of personal vehicle trips in the state, account for nearly thirty percent of motorists stopped for "very minor traffic offenses" (defined as failure to signal a lane change or speeding one to four miles per hour above posted limit).[112] The wild disparities in enforcement of minor infractions would not be such a crisis if the problem was confined to differences in monetary sanctions, rather than intrusions into privacy. However, the problem does not just occur with stops and citations: the same testimony revealed that Hispanics in Illinois accounted for twenty seven percent of vehicle searches, which have a more intrusive nature and potentially higher stakes.[113] This phenomenon is not limited to Illinois, either. In Maryland, a class action suit settlement required state police to keep records of stops and searches, and the statistics are alarming: black drivers accounted for 16.9% of all drivers on the I-95 corridor and yet, on that stretch of road, 72.9% of all drivers whose vehicles were searched were black.[114] When such disparate practices lead to searches and arrests based more on hunches and stereotypes than on proper police investigation, constitutional protection against unreasonable searches and seizures is clearly failing.

Moreover, the reasonableness of a detention or search must rest on something more than probable cause that *any* violation has occurred. The text of the Fourth Amendment contains two admonitions: no unreasonable searches and seizures, and no arrests without probable cause.[115] Over time, these separate issues have been condensed into a

110. 532 U.S. 318, 354 (2001).

111. Chavez v. Ill. State Police, 27 F. Supp. 2d 1053 (N.D. Ill. 1998), *aff'd*, 251 F.3d 612 (7th Cir. 2001).

112. Oliver, *supra* note 88, at 1424–25.

113. *Id.*

114. *Id.* at 1423.

115. *See* U.S. CONST. amend. IV.

single analysis, such that the current state of the law can be summarized as follows: if there is probable cause for the stop, it is therefore reasonable.[116] The problem with this rule is demonstrated by the penumbral crimes situation in which a search is conducted pursuant to probable cause (i.e., the officer observes a minor traffic offense, which is more than mere suspicion that the offense has occurred), but is unreasonable due to the discretion employed by the officer. In short, by relying on suspicion as the sole index of reasonableness, not only do we relinquish the ability to review other aspects of police discretion, but effectively allow the police to disregard criticisms of their use of discretion and use stops as an enforcement tool for trifling matters.

Some of the challenges of pretextual police activity for seemingly trifling matters appear to have been addressed in the recently decided *Arizona v. Gant*.[117] Overruling current doctrine regarding search incident to arrest, the Court limited the scope of vehicle searches to exigent circumstances or to evidence pertaining directly to the offense of arrest.[118] Nevertheless, newer interpretations of the *Gant* rule indicate that its scope is rather limited, and that evidence need not be excluded merely because the arrest offense was a minor one.[119]

As previously discussed, the gut-level reaction to inequitable enforcement is a simple feeling of unfairness. However, "unfair" police activity is not prohibited by the Constitution.[120] Rather, the Constitution is concerned only with activity that is "unreasonable."[121] There are several ways in which the parties in previous lawsuits have attempted to overcome this limitation, and by exploring their arguments we hope to demonstrate the intractability of the problem.

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116. The best illustration of this is *Virginia v. Moore*, 128 S. Ct. 1598, 1608 (2009), in which a violation of state law did not impact the reasonability of a probable-cause-based search.

117. 129 S. Ct. 1710 (2009).

118. *Id.* at 1723–24.

119. *See* United States v. Ruckes, No. 08-30088, 2009 U.S. App. LEXIS 24578, at *14–15 (9th Cir. Nov. 9, 2009).

> We therefore hold that, while the search cannot be upheld as incident to arrest in light of *Gant*, the deterrent rationale for the exclusionary rule is not applicable where the evidence would have ultimately been discovered during a police inventory of the contents of Ruckes's car.
>
> ... [T]he district court must conduct a case-by-case inquiry to determine whether a lawful path to discovery—such as inevitability—exists in each case. To hold otherwise would create an impermissible loop-hole in the Court's bright-line *Gant* determination.

Id. This potential "loop hole" could consist of an *Atwater* arrest for a minor offense, if the reviewing court's discretion allows it.

120. *See* Transcript of Oral Argument at 21, Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (No. 99-1408) ("It's not a constitutional violation for a police officer to be a jerk.").

121. *See* Brigham City v. Stuart, 547 U.S. 398, 403 (2006) ("[T]he ultimate touchstone of the Fourth Amendment is reasonableness....").

The first is to attempt to plumb the common law for a historical rule that supports a limitation on police arrest authority. The appellants and their amici in *Atwater* and *Whren* took this tack and argued in their briefs and at oral argument that a standard could be discerned from the historical record of American and English legal tradition.[122] Specifically, these parties proposed limiting arrest authority to those crimes that would be considered "breaches of the peace" under the common law.[123] The Court dismissed this line of argument by pointing to the practical flaws inherent in such a rule; as Justice Breyer put it, "a policeman isn't going to know the common law or breaches of the peace. A police—they're just not going to understand that."[124]

Beyond the practical problem identified by Justice Breyer, there is a more fundamental problem with looking to the common law to find solutions to problems never contemplated prior to the current vehicle code regime. Theories of arrest authority from eighteenth-century England just do not work very well in a world where state vehicle codes run to thousands of pages and contain violations as trivial as the signal-for-three-seconds-prior-to-turning requirement, which the petitioner in *Whren* neglected to follow.[125]

Another approach is to look to police rules and regulations for guidance. This was a strategy that the petitioner took in *Whren*, arguing that the police regulations prohibiting plainclothes officers from making traffic stops rendered the stop (by plainclothes officers in an unmarked car) unreasonable.[126] The Court responded by pointing out that such a rule would result in widely varying levels of Fourth Amendment protection across the country, depending on the regulations that each police department might enact.[127]

3. Legislative and Lower Court Responses

The inherent unfairness of a system that provides no constitutional protection against arbitrary demonstrations of police power has not gone unnoticed by legislatures and lower courts. However, the Supreme Court wields the "probable cause" argument to repel each attempt to create some limits on police search authority. Virginia passed a law that

122. *See* Brief Amici Curiae of the National Ass'n of Criminal Defense Lawyers & the Ass'n of Federal Defenders in Support of the Petitioners at 14–17, *Atwater*, 532 U.S. 318 (No. 99-1408); Transcript of Oral Argument, *supra* note 120, at 11–12.

123. Transcript of Oral Argument, *supra* note 120, at 13.

124. *Id.* at 15.

125. Raymond, *supra* note 5, at 1401–11.

126. Transcript of Oral Argument at 12–13, Whren v. United States, 517 U.S. 806 (1996) (No. 95-5841); Brief for the Petitioners at 37, *Whren*, 517 U.S. 806 (No. 95-5841).

127. Transcript of Oral Argument, *supra* note 126, at 15–16; *see also Whren*, 517 U.S. at 815 ("Moreover, police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable."); Gustafson v. Florida, 414 U.S. 260, 267 (1973).

restricted the arrest authority of police officers when confronted with minor offenses.[128] It instructed police officers to issue a summons and then release the detained person.[129] In *Virginia v. Moore*, the petitioner was arrested in contravention of that state law and was subsequently searched incident to the arrest.[130] The search turned up drugs, which were used as evidence against him.[131] Moore's motion to suppress the evidence uncovered in the search was denied,[132] the Virginia Supreme Court reversed,[133] and then the United States Supreme Court reversed again, holding that police did not violate the Fourth Amendment when making an arrest that was prohibited by state law because the arrest was based on probable cause that a crime had occurred.[134]

In *Moore*, the Court followed the same logic as in *Whren*,[135] but pushed the argument much further. The *Moore* Court held that an officer making an arrest in violation of a state law does not render the search pursuant to that arrest unreasonable under the Fourth Amendment.[136] The reasonableness determination is simply a question of probable cause, and while police departments or states may adopt standards more protective than those set by the Constitution, these standards do not affect the Court's determination of reasonableness.[137] The result of this opinion was to defang any legislative attempt to restrict the arrest authority of police officers: if it is no constitutional violation for police officers to make arrests in direct contravention of their states' law, then there is no meaningful restriction available for an elected representative to enact. Such an interpretation of *Moore* is supported by commentators who have read a similar rule in *Knowles v. Iowa*.[138] *Knowles*, which on its face appeared to bolster the cause of those seeking to restrict arrest

128. VA. CODE ANN. § 19.2-74 (2008).

129. *Id.* ("Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor . . . the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.").

130. 128 S. Ct. 1598, 1601–02 (2008).

131. *Id.* at 1602.

132. *Id.*

133. 636 S.E.2d 395, 400 (Va. 2006).

134. *Moore*, 128 S. Ct. at 1602–08.

135. 517 U.S. 806, 813–19 (2008).

136. *Moore*, 128 S. Ct. at 1605. Furthermore, Justice Scalia dismissed the idea that departmental rules and regulations carried any weight, writing that "founding-era citizens were skeptical of using the rules for search and seizure set by government actors as the index of reasonableness." *Id.* at 1603.

137. *Id.* at 1608.

138. 525 U.S. 113 (1998).

discretion,[139] has been interpreted as rejecting bright-line rules (such as the Virginia law) that seek to limit officers' authority to make arrests.[140]

Virginia is not alone in seeking to use legislation to change stop-and-search law that lends itself so easily to abuse. Seventeen other states have passed laws that both prohibit precisely what the Court approved in *Whren* (racial profiling), and require that law enforcement agencies maintain racial statistics on stops and searches.[141]

Another potential approach is the one suggested by the Tenth Circuit (and rejected by the Supreme Court), which requires examining not just the legality of the police officer's actions, but also his common sense, through an objective lens.[142]

It seems, therefore, that while states have acknowledged the problem of arrest for minor infractions and have taken steps to limit police action, constitutional review has been reluctant to restrict police power beyond a required level of suspicion. This has been problematic in terms of enforcement of minor infractions, and has consequently led to inequitable enforcement. We now turn to the problem of inequitability in the context of the Equal Protection Clause.

B. EQUAL PROTECTION

Equal protection litigation regarding police power is an important avenue because the Court has been reluctant to address the issue of inequality and discrimination through the Fourth Amendment.[143] As

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139. *See id.* at 118–19. An officer chose to cite a motorist rather than arrest him, despite having the authority to do so. *Id.* at 114. He then proceeded to conduct a search, later pronounced unconstitutional by the Supreme Court. *Id.* The decision pointed out that search incident to arrest can only be conducted when an actual arrest has been made; mere authority to arrest is not enough. *Id.* at 117–18.

140. *See* Oliver, *supra* note 88, at 1453.

141. *See* Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making*, 15 GEO. MASON U. CIV. RTS. L.J. 219, 219 & n.2 (2005).

142. The "would have" rule from the Tenth Circuit is: a court should ask "not whether the officer *could* validly have made the stop but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose." United States v. Guzman, 864 F. 2d 1512, 1515 (10th Cir. 1988) (quoting United States v. Smith, 799 F. 2d 704, 709 (11th Cir. 1986)).

> That an officer theoretically *could* validly have stopped the car for a possible traffic infraction [i]s not determinative. Similarly immaterial [i]s the actual subjective intent of the deputy. [A] stop [i]s unreasonable not because the officer secretly hope[s] to find evidence of a greater offense, but *because it [i]s clear that an officer would have been uninterested in pursuing the lesser offense absent that hope.*

Id. at 1517 (alterations in original) (second emphasis added) (quoting *Smith*, 799 F.2d at 710). The *Guzman* test was overruled in *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995), which held that a "traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if police officer has reasonable articulable suspicion that traffic or equipment violation has occurred or is occurring"

143. *See supra* Part II.A.

Justice Scalia explains in *Whren*, "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause."[144] This is the Court's only reference to the crucial issue it "effectively sidestepped" by focusing solely on probable cause as grounds for police discretion.[145] While, arguably, "reasonability" can (and, as we suggest later, should) be interpreted to encompass considerations of equal and consistent enforcement, we now examine how the Equal Protection Clause has been used to address problems in police discretion.

Uneven enforcement is accepted, to some degree, as an inevitable aspect of traffic laws. It is not feasible, nor desirable, for the police to enforce all the traffic violations committed in their presence.[146] At first glance, equal protection does not enter into the discussion unless there is a discriminatory way in which the police decide whom to stop. It is the discriminatory intent of the officer—and the resulting discriminatory effect—which, in the past, has raised the equal protection issue.[147]

As this section demonstrates, equal protection arguments have rarely been raised with respect to police enforcement because of two limiting aspects of the doctrine: (1) the need to prove intentional discrimination; and (2) the need to show not only that a specific group has been targeted, but also that the group falls into the category of a "suspect class." Both of these components are extremely difficult to prove, and are very problematic from theoretical and empirical perspectives.

1. Intentional Discrimination

In order to prevail in equal protection suits, plaintiffs must prove both discriminatory purpose and discriminatory effect.[148] The line of cases involving equal protection challenges to governmental policies concerning voting,[149] affirmative action in schools,[150] and marriage[151] required this particularly high standard for proving actual discrimination. In *Davis*, the Court justified this choice of standard in the negative—pointing out flaws in other approaches instead of heralding the advantages of this one:

144. 517 U.S. 806, 813 (2008).

145. *See* Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 426 n.10 (1997).

146. *See* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 223 (1989).

147. *See infra* Part II.B.1.

148. Washington v. Davis, 426 U.S. 229, 238–42 (1976).

149. Reynolds v. Sims, 377 U.S. 533, 538–54 (1964).

150. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 269 (1978).

151. Loving v. Virginia, 388 U.S. 1, 2 (1967).

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[152]

Rather than take such a risk, the Court instead adopted the intent-to-discriminate standard.[153]

This extraordinarily high standard has been roundly criticized by both civil rights leaders (who view it as a roadblock to legitimate litigation)[154] and constitutional scholars.[155] The academic argument is that the Court in *Davis* gave short shrift to the meaning of the Equal Protection Clause by limiting its application to "discriminatory purpose."[156] Michael Perry argues that the Court's approach precludes consideration of the much more common form of racial discrimination: disproportionate racial impact.[157] This idea—that from laws that have a much greater effect on a particular race, one can not only infer racial bias but also identify injury—is not particularly sophisticated. But its implications (which the Court fears would be "far reaching"[158]), go straight to the heart of discrimination. Perry's critique centers on the exclusion of disproportionate racial impact from the set of criteria that may be regarded as evidence of equal protection violations, pointing out that the most damaging "official" racial discrimination could slip through the Court's relatively porous test.[159]

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152. *Davis*, 426 U.S. at 248.

153. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 320–21 (1987). Lawrence summarizes the Court's objections as follows:

> (1) A standard that would subject all governmental action with a racially disproportionate impact to strict judicial scrutiny would cost too much; such a standard, the Court argues, would substantially limit legitimate legislative decisionmaking and would endanger the validity of a "whole range of [existing] tax, welfare, public service, regulatory and licensing statutes"; (2) a disproportionate impact standard would make innocent people bear the costs of remedying a harm in which they played no part; (3) an impact test would be inconsistent with equal protection values, because the judicial decisionmaker would have to explicitly consider race; and (4) it would be inappropriate for the judiciary to choose to remedy the racially disproportionate impact of otherwise neutral governmental actions at the expense of other legitimate social interests.

Id. (alteration in original) (footnotes omitted) (quoting *Davis*, 426 U.S. at 248 & n.14).

154. *Id.* at 319.

155. *Id.*

156. Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 541 (1977).

157. *Id.* at 544. Perry notes that the Court in *Davis* did consider, albeit briefly, disproportionate racial impact, but dismissed it nearly summarily. *See id.* at 542–44.

158. *See* Washington v. Davis, 426 U.S. 229, 248 (1976).

159. Perry, *supra* note 156, at 548–49 ("The 'discriminatory purpose' terminology used in *Washington* and elsewhere, however, is misleading. The central prohibition of the equal protection

Charles Lawrence makes a more fundamental argument: to focus on conscious, intentional discrimination fails to account for the great majority of unconscious, unintentional discrimination, which has a much more pronounced effect across society.[160] While conceding that the law might not be the vehicle through which we address this fundamental issue in society, Lawrence argues that "equal protection doctrine must find a way to come to grips with unconscious racism."[161]

There is a bright spot in the Court's otherwise dismally short-sighted equal protection jurisprudence. In the context of criminal procedure (albeit not in the context of police discretion), the Court has not demanded quite as much from the plaintiff as in civil suits. In *Batson v. Kentucky*, the Court held that equal protection forbade the use of peremptory challenges based solely on race.[162] The Court further held that a prima facie case could be made for discriminatory use of peremptory challenges if the claimant could prove the following:

> [T]he defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. *This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.*[163]

For our purposes, the point that merits special attention in *Batson* is the Court's use of inference as an indicator of discrimination—exactly what the Court has refused to do in other contexts. As other scholars have commented, in the context of police action, the *Davis* requirement of proving intentional discrimination in effect requires an officer's admission of racial bias in order for a defendant to prove discrimination.[164] But the *Batson* requirement appears to be more easily met in the context of inequitable enforcement. In the inequitable enforcement context, the test from *Batson* would allow the inference of

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clause [sic] is directed against the government's deliberate use of race as a criterion of selection. A law might employ a racial criterion of selection as a means to an objective, or purpose, having nothing to do with race." (footnote omitted)).

160. *See* Lawrence, *supra* note 153; *see also* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

161. Lawrence, *supra* note 153, at 323.

162. 476 U.S. 79, 97 (1986).

163. *Id.* at 96 (emphasis added) (citations omitted) (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

164. *See, e.g.*, Davis, *supra* note 145, at 437.

purposeful discrimination from a combination of factors, such as the disparity between the severity of the offense and the intensity of police response, the deviation from police regulations, and the citizen's socioeconomic characteristics. However, drawing an inference of purpose from the circumstances surrounding the stop, search, or arrest might not be sufficient; equal protection arguments have been successful only in the context of discrimination against specific groups.

2. The Problem of Suspect Classifications

While the problem of inequitable enforcement appears especially ugly in the context of racially-motivated pretextual stops, dealing with inequity on the basis of race overlooks the larger components of arbitrary enforcement. Inequitable enforcement might occur against groups whom constitutional litigation does not currently recognize as a "suspect class."

The importance of suspect classification stems from the fact that the Court's equal protection rulings invariably reflect its decision on the appropriate standard of constitutional review to be used in each case. If the Court uses strict scrutiny, the governmental action is usually deemed unconstitutional;[165] if the Court uses rational basis, the action is usually deemed constitutional.[166] The Court has established that, absent a showing of a suspect class, the Court will use the ultradeferential rational basis standard of review.[167] Therefore, citizens who have suffered from inequitable enforcement can only prevail if they show they are members of a "suspect class."

The idea behind limiting equal protection to suspect classes requires a few words of explanation. John Ely, beginning from Justice Stone's famous footnote in *Carolene Products*,[168] posits that the theory of strict

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165. *See* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment) ("[S]trict in theory, but fatal in fact.").

166. *See* Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

167. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 (1938).

168. *See id.* at 152 n.4

> There may be narrower scope for operation of the presumption of constitutionality when *legislation appears on its face to be within a specific prohibition of the Constitution*, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious or national or racial minorities: whether prejudice against *discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. (emphasis added) (citations omitted).

scrutiny derives from a failure in process, that the Court must give more protection to groups who lack the power in the political sphere to address their plight.[169] Ely's insight is that the failure in process is due to the identity of the group as different from the majority—that prejudice keeps the minority group from forming coalitions and thereby achieving success in the political process.[170] A minority group fails to form coalitions not because it is a minority group, but because its status as "different" precludes others from joining in its common cause.[171] Hence, the Court limits equal protection to easily identifiable minority groups.

The Court has taken the "discrete and insular" group phrase from *Carolene Products* and turned it into shorthand for those groups requiring special judicial solicitude. "But by only suspecting laws that classify by race on their face or are the result of overtly self-conscious racial motivation, the theory stops an important step short of locating and eliminating the defect it has identified."[172] In other words, in reserving strict scrutiny for only those groups which are obviously suspect (i.e., those that are discriminated against purposely), the Court asks us to blind ourselves to all but the most blatant discrimination.

In the context of inequitable enforcement, victims of arbitrary or disproportionate police actions may be random. Though the patterns may reveal racial biases in particular settings, as a general principle there is no "group" to which the victims belong, save the "group" of people who have violated the law by committing a minor infraction, or who have been treated harshly by the police in a disproportionate manner. Recently, Charles Epp, Steven Maynard-Moody, and Donald Haider-Markel found that, while black drivers are stopped more often, police officers treat disrespectful white drivers significantly more harshly than disrespectful black drivers.[173] Epp and his coauthors interpret these results to possibly mean that officers impose official intrusions and punishments on black drivers *deliberately*, rather than as a response to a difficult interaction.[174] However, their findings also imply that some nonracialized issues may yield harsh enforcement and be indistinguishable from an equal protection perspective.[175]

Again, Lawrence's theory of inherent racism is useful as a comparison. Lawrence identifies a certain circular, self-defeating logic in

169. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 151–53 (1980).

170. *Id.*

171. *Id.*

172. Lawrence, *supra* note 153, at 349.

173. *See* Charles R. Epp et al., *Racial Profiling as Racialized Surveillance* (unpublished paper presented at the Law and Society Association Annual Meeting, Denver, CO (2009)).

174. *Id.*

175. *Id.*

the intentional discrimination requirement of *Davis*.[176] By requiring a plaintiff to show purposeful discrimination, the Court

> creates an imaginary world where discrimination does not exist unless it was consciously intended. . . . If there is no discrimination, there is no need for a remedy; if blacks are being treated fairly yet remain at the bottom of the socioeconomic ladder, only their own inferiority can explain their subordinate position.[177]

Requiring purposeful discrimination before recognizing a violation of equal protection is a mistake. Requiring the existence of a suspect class compounds this same mistake.

One could even argue that, in some ways, arbitrary enforcement, seemingly unrelated to race, might raise feelings of confusion and mistrust beyond those raised in cases that more closely resemble racial profiling. Trust in the police depends, to a great extent, on a citizen's demographics. Studies have found lesser degrees of trust among minority groups.[178] While this tendency might be perpetuated by racialized enforcement, arbitrary enforcement of minor infractions in violation of police regulations might expand these sentiments of mistrust to other population sectors.

In summation, the challenges of proving intent and suspect classification make the Equal Protection Clause a problematic tool for addressing inequitable enforcement, arguably more so than the Fourth Amendment's reasonability requirement. We now turn to examine some possible solutions.

III. INTRODUCING INEQUITABILITY INTO CONSTITUTIONAL REVIEW

Given the limitations of the existing mechanisms of the Fourth Amendment and the Equal Protection Clause, we suggest expanding the criteria by which police activities are assessed to include other factors about the offense, the situation, and the officer's response. We begin by providing these additional variables and proceed by offering ways in which they can be incorporated into existing constitutional discourse.

A. ASSESSING INEQUITABILITY: A MULTIVARIATE APPROACH

Given the limitations of a suspicion/discrimination approach to law enforcement review, one proposed solution is to expand the criteria used by the courts to assess "reasonability" of police action under the Fourth Amendment to include other dimensions, such as unfairness,

176. *See* Lawrence, *supra* note 153, at 325.

177. *Id.*

178. *See* David A. Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1228–29 (2006).

arbitrariness, and lack of proportion. The Court in *Whren* hesitated to do so, explaining:

> Petitioners urge as an extraordinary factor in this case that the "multitude of applicable traffic and equipment regulations" is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop. *But we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement.* And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.[179]

Indeed, quantifying inequitability is, as the Court correctly states, problematic if one is to rely on a decisive principle. We also keep in mind that it is not feasible, nor desirable, to allow every citizen who feels indignant about police enforcement in her case to make a constitutional argument against it. Finally, we acknowledge that the balance in each of these categories of equitability may differ across states, cities, and police departments; notions of fairness could depend on local conditions and relationships. For these reasons, we believe that a multifactor analysis, taking into account a variety of issues concerning the offense, enforcement policy, police response, and citizen demographics, is a more useful tool. Granted, a multifactor approach to reasonability is not devoid of problems and areas of vagueness, but we believe it still clarifies, rather than obscures, the current standards (which, in themselves, allow for areas of vagueness). We do not see this as a liability, in light of the highly localized nature of American policing.[180]

1. Characteristics of the Infraction

Different criminal offenses require different enforcement approaches and, therefore, the type of law broken plays an important part in assessing the reasonability of police response. One possible distinction is the classic distinction between mala in se and mala prohibita,[181] which is relevant when making decisions about enforcement priorities. The enforcement of mala prohibita offenses is not a moral priority, but rather a regulation necessity. As such, the frequency and intensity of enforcement should be tailored to meet the necessity and not go beyond.

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179. Whren v. United States, 517 U.S. 806, 818–19 (1995) (emphasis added).

180. *See* SKOGAN & FRYDL, *supra* note 6, at 55.

181. Mala in se offenses are acts, like murder, arson, or rape, that are considered "inherently immoral." BLACK'S LAW DICTIONARY 978 (8th ed. 2004). Mala prohibita offenses are wrong because they are prohibited by positive laws. *Id.* The distinction is somewhat related to issues of severity, but does not always overlap with the distinction between statutory offenses and major crimes. Werner Bertelsmann, *The Essence of* Mens Rea, 1974 ACTA JURIDICA 34, 42 (1974).

The mala in se/mala prohibita distinction, on its own, raises several difficulties. First, in some cases the court might want to use mala prohibita offenses as pretexts for the enforcement of mala in se offenses.[182] In addition, there are cases in which the distinction is not easy to make, such as drug usage, which can be seen as an urban regulatory matter or as a zealous moral war.[183] Viewing enforcement against drug traffickers as a regulatory matter does not, however, mean that it is unnecessary.[184] Similarly, viewing a certain issue as a moral fault does not necessarily imply it should be a priority for law enforcers, particularly given the concern over moral panics and crusades and their impact on punitiveness.[185]

Another important factor is the severity of the offense. While the severity as proscribed by the legislator is certainly relevant (in hopes that law enforcement policy focuses on what the legislator deems important), public perception of offense severity might also play an important role. After all, a sense of unfairness and indignation arises more from the incongruence between the intensity of enforcement and the perceived severity of the lawbreaking incident than from the formal sentence attached to the offense.[186] This assessment, while important, is complicated by the fact that, while in some instances there is a strong public consensus about severity (i.e., crimes against the person consistently rank as more severe than crimes against property[187]), there are some demographic differences in assessing severity.[188] The debate between criminal law scholars and social scientists as to whether the public shares a "natural" sense of fairness, justice, and appropriate severity is relevant when relying on that sense to require fairness from the police.[189]

Similarly, for offenses in which the degree of deviation from the norm can be quantified (i.e., speeding or drug possession), the quantified difference might be an important parameter for measuring the inequitability of enforcement. This parameter is similar to Raymond's

182. *See supra* Part I.

183. *See* TROY DUSTER, THE LEGISLATION OF MORALITY: LAW, DRUGS AND MORAL JUDGMENT (1972).

184. ROBERT J. MACCOUN & PETER REUTER, DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES AND PLACES 30–32 (2001).

185. The concern here might be about making the mistake of typifying crimes committed by certain people as more "morally wrong" than others. A classic example is the moral weight attached by politicians and interest groups to drug abuse by minorities, leading to the prohibition of some drugs but not others. *See* DUSTER, *supra* note 183.

186. Such indignation may have fueled Mrs. Atwater in her § 1983 lawsuit.

187. MARVIN E. WOLFGANG ET AL., NATIONAL SURVEY OF CRIME SEVERITY, at VI–X (1985).

188. Sergio Herzog, *Does the Ethnicity of Offenders in Crime Scenarios Affect Public Perceptions of Crime Seriousness? A Randomized Survey Experiment in Israel*, 82 SOC. FORCES 757, 774 (2003).

189. *See generally* PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE 138–39 (2006).

suggestion regarding "penumbral crimes,"[190] and is also what actual legislators have used to "decriminalize" possession of small amounts of marijuana.[191] It should be kept in mind, however, that the acceptable degree of deviation for which enforcement seems inequitable may change from time to time.[192] Other questions impacting enforcement discretion include the existence of a victim[193] and the potential for certain infractions to yield evidence of other, more severe infractions, as opposed to being mere pretexts for targeting more severe, albeit unproved, suspicions.[194]

The challenge in introducing these considerations has to do with the Court's notorious rejection of empirical facts regarding public opinion. The Court's untested assumptions of what the public considers a proper exercise of police discretion are often wrong.[195] However, blatant inequality does in certain instances generate public outcry, leading to decreased enforcement and, eventually, legalization. Examples of this include sexual behavior between consenting same-sex adults in the United States[196] and earlier in the United Kingdom.[197] In such cases, the disproportion between the intensity of enforcement (and the resources generated to support it) and the conduct addressed is blatantly inequitable.

2. *Public Familiarity with Enforcement Standards*

Much of our notion of fairness in the criminal justice context stems from the legality principle: we feel it inherently unfair to be punished for

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190. *See* Raymond, *supra* note 5, at 1436–38. Raymond sees the solution to the penumbral crime problem in legislation that prohibits certain "ranges" of infraction, rather than in judicial review of police power. *See id.* at 1437.

191. Robert J. MacCoun et al., *Do Citizens Know Whether Their State Has Decriminalized Marijuana? Assessing the Perceptual Component of Deterrence Theory* 5 (Goldman Sch. Pub. Pol'y, Working Paper No. GSPP08-011, 2008). The decriminalization distinguishes between different types of drug offenses; one could envision distinctions based on type of drug and amount.

192. This fundamental understanding is the basis for Durkheim's functionalist theory, as well as for labeling theory in criminology. *See* HOWARD S. BECKER, OUTSIDERS 184 (1963); EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 265 (1899).

193. Note the problematic notion of the concept of victimless crime. *See* Roach, *supra* note 26, at 680.

194. See MACCOUN & REUTER, *supra* note 184, for further elaboration on this distinction. One such example might be different kinds of drugs. Absent additional circumstances, such as early and heavy use, marijuana abuse is not, in itself, a predictor of future abuse of more addictive and dangerous drugs. Michael T. Lynskey et al., *Escalation of Drug Use in Early-Onset Cannibis Users vs Co-twin Controls*, 289 JAMA 427, 432 (2003). Therefore, it seems that stops and arrests for marijuana possession cannot be justified on the basis that marijuana abuse might generate more serious drug activity.

195. *See e.g.*, Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 903–04 (2009).

196. *See* Lawrence v. Texas, 539 U.S. 558, 569–70 (2003).

197. *See* THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 43 (1963) [hereinafter WOLFENDEN REPORT].

a behavior that was not a criminal offense at the time we engaged in it.[198] If the public is familiar with law enforcement policies, certain expectations arise as to the probability of being stopped, searched, or arrested. The question is to what extent should we respect these expectations. It seems that the more universal and embedded the knowledge of the no-enforcement zone is, the more we should hold the enforcement agency accountable to it. It is very problematic to allow legislators and enforcers to speak in different voices and then expect the public to rely on one and ignore the other.[199]

One possible argument might be that while the public is expected to know the law (and legally presumed to know it[200]), it is not expected to be familiar with enforcement policies. However, there is substantial empirical evidence that undermines such expectations. Survey-based studies have found that the public is unfamiliar with formal law,[201] particularly if it is not heavily publicized.[202] However, it is reasonable to assume that the public might be more familiar with enforcement policy, which in many cases is more visible than the law on the books and has a much more direct impact on citizens' lives.

The assumption that people are familiar with enforcement standards is particularly strong in situations in which the police rely on written regulations and enforcement has otherwise been consistent. In these cases, arbitrary deviation from usual enforcement standards is more surprising, and it may shake the trust citizens have in the police and in government in general.[203]

3. Proportionality of Police Response

In some cases, a minor infraction and a history of underenforcement may in themselves amount to inequitability.[204] However, in other cases, it would also be useful to examine the proportionality of police response and to deem it inequitable if it exceeds common sense under the

198. This is one of the cornerstones of criminal law, established by Enlightenment-era literature. *See* CESARE BECCARIA, ON CRIME AND PUNISHMENT 29 (Adolph Caso ed., Int'l Pocket Library 4th ed. 1983) (1764).

199. There are other examples in criminal justice in which the Court has refused to recognize more than one voice for the government. *See, e.g.*, Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 568 (1971). Recently, however, in *Herring v. United States*, 129 S. Ct. 695, 704 (2009), the Supreme Court was willing to exempt police officers from responsibility for a mistake made by other officers.

200. *See, e.g.*, MODEL PENAL CODE § 2.04 (1985).

201. For one empirically tested example, see Peter Bowal, *A Study of Lay Knowledge of Law in Canada*, 9 IND. INT'L & COMP. L. REV. 121, 136 (1998).

202. In their study on marijuana decriminalization, Robert J. MacCoun and his coauthors pointed out that the original decriminalizing statutes were heavily publicized, and therefore, the public was familiar with them; however, currently, people are largely unaware that their state has decriminalized marijuana. *See* MacCoun et al., *supra* note 191, at 356.

203. *See* SKOGAN & FRYDL, *supra* note 6, at 300–01.

204. Think, for example, of a traffic citation for driving one mile over the speed limit in a rural area where no one has ever been issued a citation.

circumstances. In *Atwater*, the petitioner was arrested for not wearing a seatbelt while her children were in the car.[205] Some evidence referred to in the decision suggests that the arrest was the result of an altercation between Atwater and the police officer.[206] In this way, it would be important to find out whether police action resulted from a minor incident, following which the interaction between the officer and the citizen escalated into a full-blown conflict. In those situations, the arrest may be taken out of proportion, and may reflect the police officer's frustration with a situation that would not have arisen but for the initial stop.[207] Finally, another consideration may be the animus surrounding the enforcement event. Enforcement may be deemed inequitable when it is accompanied by threats, epithets, or other destructive expressions or behaviors on the part of the police.[208]

4. Citizen-Related Circumstances

As mentioned in the Introduction, the concept of equity, while not limited to issues of equality, certainly encompasses a commitment to equality.[209] And, as mentioned above, one of the areas in which the police are most often critiqued is inattentiveness to racial inequality.[210] We have also seen that the Supreme Court has hesitated to outlaw racial profiling.[211] Various jurisdictions have seen it as problematic and have created legislation that abolishes it as a practice.[212] However, there are some issues pertaining to the citizen's identity that merit further reflection. One example is the extent to which a different level of enforcement is justified against citizens with a criminal record. The Supreme Court has supported this practice, going so far as to relax the level of suspicion required to search parolees.[213] This approach raises two problems. First, there is the concern that tougher enforcement policies toward citizens with a criminal history could be perceived as punishment for previous transgressions.[214] The second problem pertains to the connection between a citizen's criminal record and other demographic features. Given the data on overenforcement against minorities, some

205. 532 U.S. 318, 323–24 (2001).

206. *See id.* at 324. The officer in Atwater is quoted to have said "we've met before." *Id.*

207. When looking at these situations, one must be cognizant of the role ethnicity and culture can play in the perceived opposition to the officer. *See* Epp et al., *supra* note 173. *See generally*, BECKER, *supra* note 192, at 184.

208. This becomes more important in Part IV, in which we discuss Tom Tyler's work.

209. *See* Shanske, *supra* note 1.

210. *See* SKOGAN & FRYDL, *supra* note 6, at 301.

211. *See* Whren v. United States, 517 U.S. 806, 813 (1996).

212. *See supra* Part II.A.3.

213. *See* Samson v. California, 547 U.S. 843, 857 (2006).

214. This is, admittedly, a rather naïve argument; the current sentencing system has a variety of features, such as parole violations and three-strikes laws, in which one's criminal history certainly leads to a more aggressive fate in terms of sentencing. It should be kept in mind, however, that this Article tackles police enforcement, which is not even to be regarded as punishment.

criminologists have suggested that enforcement policies might use criminal record as a proxy for belonging to a minority group.[215] This prospect again raises problems regarding equal protection litigation.

B. Fourth Amendment–Based Inequitability

We now turn to examine the feasibility of introducing these factors into constitutional doctrine using existing constitutional mechanisms. First, we suggest including the new set of variables as part of a "totality of the circumstances" analysis. We then move on to suggest that courts might find inequitable enforcement to be per se unreasonable, or use the factors as part of a balancing test.

1. *Totality of the Circumstances Test and Inequitable Enforcement*

To construct a Fourth Amendment argument that addresses inequitable enforcement, the first solution we propose is to consider any incident of inequitable enforcement as an additional factor to be included in the totality of the circumstances determination of reasonableness. In the Fourth Amendment context, the totality of the circumstance test is the objective measuring stick for reasonableness.[216] This test is not a bright-line rule, but instead a flexible approach that the Court adopted because of its elasticity in the face of widely varying situations implicating the Fourth Amendment.[217] For example, on different occasions the Court has articulated various permissible considerations within the totality of the circumstances.[218] Under this approach, the fact that a certain offense is penumbral in nature, or the location of the particular conduct within the penumbra, would also be considered for the totality of the circumstances test.

2. *Inequitable Enforcement Is Per Se Unreasonable*

The second option is to define inequitable enforcement as per se unreasonable, thereby removing the battle from Fourth Amendment grounds, and instead determine, on a case-by-case basis, whether particular police activity is inequitable. This would be accomplished through an evidentiary or pretrial motion hearing (like a *Murgia*[219] or *Pitchess*[220] motion). The attraction of this approach is simplicity: it would

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215. Barbara Hudson, *Diversity, Crime, and Criminal Justice*, *in* The Oxford Handbook of Criminology 158, 161–63 (Mike Maguire et al. eds., 2007).

216. *See* Ohio v. Robinette, 519 U.S. 33, 39 (1996)

217. *See id.*

218. See, for example, the role of veracity and basis of knowledge in establishing probable cause after *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

219. This is a motion to dismiss criminal charges based on a showing of selective prosecution for improper purposes, which amounts to an equal protection violation. *See* Murgia v. Mun. Court, 540 P.2d 44, 48 (Cal. 1975).

220. This is a motion to discover complaints made by other people against the law enforcement officer involved in the defendant's case, in order to show a pattern of aggressive behavior by the

take just a single holding by the Court that inequitable enforcement that leads to arrest or search renders that arrest or search unreasonable. Trial court judges currently make similar judgments at pretrial suppression hearings, where they are tasked with fact-centric disputes about police behavior.[221]

3. Balancing Test

The third possible solution is for the courts to balance the interests of the state against those of the individual, using formulas already created by the Court in other contexts. Thus far, balancing tests have been reserved for searches conducted without probable cause, namely administrative searches[222] and other special needs searches.[223] In each of these scenarios, the Court has approved warrantless, suspiciounless searches only because the governmental interests were so great, and privacy interests comparatively minimal.[224] The advantage of adopting such a test in the inequitable enforcement context is flexibility: in the situations in which police behavior is more egregious, there will be more protection, and vice versa. The disadvantage is practicality: unlike the per se approach discussed above, this does not provide lower courts with anything close to a bright-line rule. Lower courts would have to determine, on a case-by-case basis, not only how bad the police conduct was, but also how great the governmental interests served by the conduct was.

A possible hurdle for this proposal is probable cause: the Court has expressly declined to use balancing tests where the stop or search was made pursuant to probable cause.[225] However, the Court's ruling in *Delaware v. Prouse* generates some support for a balancing test of reasonability.[226] In *Prouse*, the Court found that the challenged law gave so much discretion to police officers (who were making suspicionless, random stops to check licenses and registrations) as to make the resulting stops unreasonable.[227] The same problem is present in the case of stops for minor traffic offenses. As defense counsel argued in *Whren*,

officer. *See* Pitchess v. Superior Court, 522 P.2d 305, 308 (Cal. 1974).

221. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 653 (1961) (reasonableness of police search is for trial court to determine); Burris v. United States, 192 F.2d 253, 254 (5th Cir. 1951).

222. *See* New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).

223. *See* United States v. Ramsey, 431 U.S. 606, 616 (1977).

224. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

225. Virginia v. Moore, 128 S. Ct. 1598, 1604 (2009) ("In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable.").

226. *See* 440 U.S. 648 (1979).

227. *Id.* at 663.

the current traffic enforcement regime gives police officers just as much discretion as the Court found objectionable in *Prouse*.[228]

C. Altering Equal Protection Doctrine to Detect Inequitability

We are less hopeful as to the potential of addressing inequitable enforcement through the Equal Protection Clause. As discussed above, the historical approach of the Court has been overly narrow in identifying and addressing this type of discrimination. We argue that it has been overly narrow in insisting on determining the existence of a group before vindicating the right for the individual. However, equal protection of the laws does not implicitly require equal protection of the laws for each *group*. Nothing in the words of the Fourteenth Amendment limits the availability of relief to groups. Lawrence and other critics of the *Davis* opinion point out the shortcomings in the Court's approach to finding equal protection violations; their solutions focus on encouraging the Court to take a broader view of the clause—and a more realistic view of the state of society.[229] The inequitable enforcement problem is, therefore, one more reason for the Court to move beyond classes of people and find equal protection violations on an individual level.

Another challenge to defendants wishing to use Equal Protection to address inequitable enforcement is the issue of remedy. Unlike the Fourth Amendment, there is no exclusionary remedy for Fourteenth Amendment violations, and any civil remedies would likely mean little to an incarcerated person.[230] In the rare instances in which criminal defendants have raised successful equal protection claims, the remedy has been dismissal of the case. In *Batson*, though technically the remedy was a remand, the rule established for future cases requires dismissal.[231] In *United States v. Armstrong*, an unsuccessful attempt to demonstrate discriminatory prosecution, the defendant sought dismissal as an appropriate remedy.[232] However, it would not be practically necessary for most defendants to have both dismissal and suppression of evidence as remedies at their disposal, as long as one of the two is available.

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228. *See* Transcript of Oral Argument, *supra* note 126, at 10.

229. *See* discussion *supra* Part II.B.1.

230. *See* Davis, *supra* note 145, at 436. Davis identifies a further problem—that of the difficulty of a convicted criminal winning a jury verdict against the police department responsible for taking him or her off the street. *Id.*

231. *See* Batson v. Kentucky, 476 U.S. 79, 100 (1986).

> Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings. If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed.

Id.

232. 517 U.S. 456, 459 (1996).

Suppression of evidence uncovered through an unlawful search usually has the practical effect of dismissal since, without that evidence, there is rarely much more to the prosecution's case.

IV. NORMATIVE IMPLICATIONS

Changes in Fourth Amendment doctrine, such as making it more inclusive of issues of disproportion, arbitrariness, and demeanor, may in turn generate change in police regulations, police activities in the field, and citizen behavior. This concluding Part examines some potential implications, which assume that police culture is, indeed, responsive to legal decisions.[233]

A. FLEXIBILITY

One possible source of resistance to the multifactor test could be the Court's preference for simpler rules and guidelines for police and lower courts. The rationale would be that a multifactor approach does not provide police officers in the field with a comprehensive "how-to" guide to their interactions with citizens.[234] While these considerations should not be discounted, it is important to keep in mind that the existing standard of suspicion relies on balancing amounts of information and weighing considerations.[235] Proportionality can be coded into internal regulations just like level of suspicion. The Court did not hesitate to move toward these substantive and nonformalistic tests and away from the warrant requirement.[236] Relying on police discretion and good judgment should be a two-way street: if we place upon the police's shoulders the duty to correctly calibrate the amount of suspicion, there is no reason to believe that they will do a poorer job calibrating the proportional relationship between the offense, the offender's demeanor, and the optimal enforcement reaction.

B. FORESEEABILITY, DETERRENCE, AND ELASTICITY

Under an equitability review system, the police will be required to adhere to commonly held expectations about enforcement based on

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233. Some argue that the police are held to higher standards of accountability beyond those imposed by Supreme Court constitutional decisions. *See, e.g.*, Samuel Walker, *Beyond the Supreme Court: Alternative Paths to the Control of Police Behavior*, 14 AM. J. CRIM. JUST. 189 (1990); *see also* SKOGAN & FRYDL, *supra* note 6, at 100.

234. This argument has been particularly pertinent to cases in which the police rely on the "good faith" exception to the exclusionary rule, *see* Herring v. United States, 129 S. Ct. 695, 701 (2009), and was also a substantial part of the decision in *Terry v. Ohio*, 392 U.S. 1, 27 (1967).

235. *See* Illinois v. Gates, 462 U.S. 213, 233 (1983).

236. In *Gates*, for example, the Supreme Court moved away from the formalities required in previous cases for establishing suspicion. *Id.*; *see also, e.g.*, Spinelli v. United States, 393 U.S. 410, 415 (1969).

regulations. Foreseeability is, in general, a positive outcome, which will clarify enforcement policies to minimize vagueness.[237] However, it raises the concern that a more lenient enforcement policy will create a decline in deterrence. Some studies suggest that the "law in the books" has symbolic value and offers deterrent effects regardless of the level of enforcement.[238] A potential decline in deterrence is a legitimate concern. Nevertheless, it is important to remember that a sanction's severity is only one variable that predicts deterrence. Experimental behavioral studies have consistently found certainty of enforcement—or risk of apprehension—to be a more reliable determinant of deterrence than the expected severity of punishment.[239] One criticism of tailoring enforcement to meet citizen expectations focuses on a potential decline in deterrence, seeing as deterrence is supposedly a function of severity.[240] However, deterrence is also a function of certainty, and when people assess that their chances of getting caught are slim, deterrence does not work very well,[241] which means that practical expectations probably play more into this than black letter law anyway.

Another possible concern is that if potential offenders are better able to predict their chances of being searched and detained, the element of surprise in police activity is greatly diminished and criminal activity will change to avoid police encounters. These risks depend on the elasticity of crime and the quality of policing. Ideally, a review of equitability will take into account realistic police concerns when examining the proportion of police reaction. That means that any increase in criminal activity in response to heightened foreseeability will manifest itself in an increase in penumbral crimes, which are not a grave concern anyway. Also, while the intrusiveness of policing may diminish, there is no reason to assume that police enforcement will decrease in terms of its geographical reach or in terms of the quality of information obtained. We think, therefore, that the benefits of foreseeability exceed the risks of elastic criminal behavior.

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237. "The void-for-vagueness doctrine requires that penal statutes define crimes so that ordinary people can understand the conduct prohibited and so that arbitrary and discriminatory enforcement is not encouraged." United States v. McLamb, 985 F.2d 1284, 1291 (4th Cir. 1993).

238. One such study is Patricia Funk's study of voting patterns in Sweden. *See* Patricia Funk, *Is There an Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135 (2007). Funk found that, after the legal duty to vote during the elections was canceled, voter percentages declined, despite the fact that the law had been underenforced for many years; Funk concludes that deterrence stemmed from the law's symbolic value. *Id.*

239. *See, e.g.*, Edmund S. Howe & Thomas C. Loftus, *Integration of Certainty, Severity, and Celerity Information in Judged Deterrence Value: Further Evidence and Methodological Equivalence*, 26 J. APPLIED SOC. PSYCHOL. 226, 238–39 (1996).

240. Harold G. Gramsick & Robert J. Bursik, *Conscience, Significant Others, and Rational Choices: Extending the Deterrence Model*, 24 LAW & SOC'Y REV. 837, 839–40 (1990).

241. *Id.* at 840.

C. SLIPPERY SLOPE OF LENIENCY

One possible concern about the idea of equitable enforcement is related to the relationship between formal criminal law and enforcement policies: if the police show more commitment to the "buffer zones" of criminal prohibition and refrain from enforcing penumbral crimes, formal law will gradually morph and decriminalize penumbral crimes.[242] As the reach of criminal law narrows, more and more crimes will move into the "buffer zones" of law, which will lead to a slippery slope of decriminalization.

This concern about a slippery slope of leniency can be addressed in several ways. First, an examination of punitive tendencies in the United States strongly suggests that a slide toward leniency is not a realistic concern. In fact, studies following the punitiveness of criminalization and enforcement policies consistently demonstrate that, since the late 1970s, definitions of crimes have broadened and sentences that result from convictions have increased.[243] Moreover, several studies suggest that this increase in punitiveness is not supported by public opinion, but is rather initiated by politicians in response to perceived threats,[244] despite a decline in reported crime.[245] Given the tendency of the enforcement universe to expand rather than contract,[246] a shift toward contraction seems unrealistic.

Second, concerns about changes in the scope of formal law in response to informal policies assume a great level of responsiveness on the part of state politicians to enforcement practices that may be initiated and applied at the city level, and sometimes at the neighborhood level. Much police practice involves deep acquaintance with urban conditions and neighborhood populations. It is therefore unlikely that formal law, at the state level, will be tailored to address local needs.

Third, even if conforming to the requirements of equitable enforcement may eventually lead to a narrowing of the scope of formal

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242. This concern stems from historical examples in which underenforcement, or difficulty in enforcement, was an important factor in subsequent decriminalization or legalization. One example is the *Wolfenden Report*, which referred to the challenges of enforcing prohibition on sexual acts between consenting adults as one reason for their legalization. *See* WOLFENDEN REPORT, *supra* note 197, at 23, 43.

243. *Compare, e.g.*, CAL. VEH. CODE § 23152(b) (West 1987) (defining unlawful "driving under the influence" as driving while having a blood alcohol percentage of .10% or more), *with* CAL. VEH. CODE § 23152(b) (West 2008) (defining the same crime as driving while having a blood alcohol percentage of .08% or more). For further information, see SENTENCING REFORM IN OVERCROWDED TIMES 249 (Michael Tonry & Kathleen Hatlestad eds., 1997).

244. *See, e.g.*, JONATHAN SIMON, GOVERNING THROUGH CRIME 22 (2007).

245. *See* FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 1 (2007); Douglas Thompson & Anthony Ragona, *Popular Moderation Versus Governmental Authoritarianism*, 33 CRIME & DELINQ. 337, 351 (1987).

246. STANLEY COHEN, VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT, AND CLASSIFICATION 49–56 (1985).

law to match underenforcement policies, this is not necessarily an undesirable outcome.[247] When given the choice between rigid and harsh, albeit often unenforced laws and a more lenient set of laws that is consistently enforced, considerations of foreseeability and justice may lead us to prefer the latter setting over the former.

D. TRANSPARENCY

Another issue with legalizing equitability might be the concern about a decline in transparency. Since, under a review of equitability, one of the factors will be the police's adherence to their declared policies, such policies may gradually become less available to the public, so as not to bind the police to their regulations. Such developments might defeat the purpose of a broad review of police work; rather than regulating arbitrariness, a broad regulation would generate "avoidance techniques" on the part of the police, which would actually increase arbitrariness. These concerns would be graver were the police not a bureaucratic organization, relying on regulation and procedures for its daily operations.[248] Given the need for these regulations, it does not seem likely that holding police officers accountable to regulations would decrease reliance upon regulations.

E. FAIRNESS

An insistence on police adherence to a sense of proportion will have an additional long-term benefit for police activities: namely, generating a public sentiment that police enforcement is fair. Empirical research by behavioral scientists has found increasing evidence of the importance of fairness to public-police relations. Tom Tyler's classic book, *Why People Obey the Law*, suggests that, based on surveys, the level of public compliance rises in cases in which there is perceived fairness.[249] Moreover, the book, and other works by Tyler and collaborators, emphasize the important role of procedural justice.[250] When people thought they were treated fairly, the level of legitimacy they ascribed to the law and their motivation for compliance and cooperation rose, regardless of the actual outcome of their cases.[251] Most recently, Tyler and Jeffrey Fagan examined variables that led people to cooperate with

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247. The *Wolfenden Report* is a good illustration of this argument. *See* WOLFENDEN REPORT, *supra* note 197, at 79.

248. For the police's reliance on regulations, see SKOGAN & FRYDL, *supra* note 6, at 184, and Walker, *supra* note 233.

249. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 161–62 (1990).

250. *See id.* at 105; Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (2003).

251. TOM R. TYLER & E. ALLAN LIND, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 64 (1988); TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 85–86 (1998).

the police.[252] The most important considerations, by far, had to do with the quality of the encounter.[253] People who felt they were treated fairly and politely expressed more faith in the police and more willingness to assist the police in the future—regardless of the outcome of their interaction with the police.[254]

These findings imply that a commitment to equitable enforcement may yield long-term benefits to the police. Such a conclusion may be counterintuitive from a law and order perspective, which would support harsher policies for the purpose of deterrence.[255] They also imply that the distinction between effective law enforcement and constitutional rights may be a false one, and that a classic mechanism of Packer's due process model—more constraints on police discretion[256]—might ultimately make the police more effective and therefore promote crime control for the long term.

A final word pertains to the impact of the financial crisis on policing. In lean years, the criminal justice system will find a variety of ways to scale back costs and expenses associated with law enforcement.[257] One way of doing so is to focus law enforcement on areas that yield the largest increase in public safety. While increasing an arrest quota in hopes of catching serious crime through pretextual tactics is a measurable achievement in the short-term, long-term considerations may suggest that the dividends to be reaped from fairness are more impressive. Fairness, in the long run, will increase compliance and, therefore, public safety.

CONCLUSION

Our analysis suggests that the current parameters for assessing police discretion fail to capture important dimensions that would encourage sound common sense and a proper understanding of enforcement priorities. As argued above, the dearth of effective tools for review is not due to narrow constitutional language, but its narrow interpretation by the Supreme Court, which has rejected several relevant considerations. The problem of inequitable enforcement extends beyond issues of suspicion and blatant racial inequalities to include a rich set of problematic situations.

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252. Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 250 (2008).

253. *Id.* at 264.

254. *Id.* at 267.

255. *See* GEORGE L. KELLING & CATHERINE COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES 257 (1996).

256. *See* PACKER, *supra* note 3.

257. *See* Hadar Aviram, *Humonetarianism: The New Correctional Discourse of Scarcity*, 7 HASTINGS RACE & POVERTY L.J. 1 (2009).

We believe that law enforcement will benefit, in the long run, from generating a sense of fairness. Such sentiments would be fostered if the assessment of police behavior is expanded to include the characteristics of the infraction, public familiarity with enforcement standards, and the proportionality of police response. Even if changes in constitutional analysis to encompass our multivariate suggestion are unrealistic in the current Supreme Court, they are offered to our readers as a reminder of the boundaries of law, and of the limited ability to understand the interaction between the police and the community based on suspicion alone.

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